

BEFORE THE KANSAS WORKERS COMPENSATION APPEALS BOARD

[illegible]

Docket Nos. 1,072,228¹
& 1,073,319

ORDER

STATEMENT OF THE CASE

Respondent and its insurance carrier (respondent) appealed the November 6, 2015, Preliminary Hearing Order entered by Administrative Law Judge (ALJ) Steven M. Roth. George H. Pearson of Topeka, Kansas, appeared for claimant. Meredith L. Moser of Overland Park, Kansas, appeared for respondent.

The record on appeal is the same as that considered by the ALJ and consists of the transcript of the November 3, 2015, preliminary hearing and exhibits thereto; and all pleadings contained in the administrative files.

ISSUES

The ALJ granted claimant's request for gastric bypass bariatric surgery, finding that claimant proved "by the smallest of all margins"² that such surgery will specifically aid in the treatment or cure of claimant's work-related injuries.

¹ Although the captions of the November 3, 2015, preliminary hearing transcript and the November 6, 2015, Preliminary Hearing Order list only Docket No. 1,073,319, the parties agreed both docket numbers were being heard at the November 3, 2015, preliminary hearing and any appeal encompassed both docket numbers. See pages 28 and 29 of the November 3, 2015, preliminary hearing transcript and page 1 of the November 6, 2015, Preliminary Hearing Order.

² ALJ Order at 3.

Respondent appeals, arguing claimant's workplace accidents were not the prevailing factor causing claimant's morbid obesity, low back pain and left hip pain.

Claimant asks that the Preliminary Hearing Order be affirmed.

The sole issue is: should respondent be required to provide gastric bypass bariatric surgery for claimant?

FINDINGS OF FACT

When claimant came to work on May 7, 2014, his chair was missing. He was told to sit in another chair and it collapsed. Claimant fell, striking his head on a cubicle and felt immediate low back and left hip pain. As a result, claimant filed an application for hearing in Docket No. 1,072,228. Claimant testified he received conservative treatment for his low back injury, including five or six epidural steroid injections from Dr. Guy Giroux.

On February 25, 2015, claimant alleges he slipped on ice at work and fell, injuring his neck, left hip and left shoulder. For this accident, claimant filed an application for hearing in Docket No. 1,073,319.

At the preliminary hearing, claimant indicated he was currently working for respondent, performing his regular duties.

Dr. Harold A. Hess evaluated claimant on March 27, 2015, for his low back and left hip injuries. The doctor noted claimant weighed 460 pounds, was 6 feet 1 inch tall and is morbidly obese. According to the doctor, claimant reported having low back pain with flare-ups dating back to 1997. Claimant reported having significant low back and left hip pain since his May 7, 2014, work accident. The doctor noted that a lot of claimant's pain was centered into his left hip. The doctor stated, "[m]y suspicion is that this patient has a left hip injury as a result of the chair collapsing and his fall."³ Dr. Hess opined claimant's May 7, 2014, work injury was the prevailing factor causing his current medical condition and symptoms.

Dr. Hess reviewed claimant's medical records and indicated he had low back pain episodes in 2004, 2005, 2007 and 2010. A 2010 CAT scan and 2010 MRI showed multi-level degenerative changes and the 2010 MRI also showed a left L5-S1 disc extrusion. The doctor noted January 2013 and August 2014 MRIs showed L3-4 and L4-5 stenosis with a left greater than right L5-S1 foraminal stenosis secondary to disc protrusion and the 2014 MRI indicated a slightly increased disc protrusion into the left L5-S1 foramen.

³ P.H. Trans. (Nov. 3, 2015), Cl. Ex. 2 at 2.

For claimant's left hip, Dr. Hess recommended referral to an orthopedist for evaluation and treatment. If the evaluation failed to find left hip, pelvis or sacral pathology, Dr. Hess then recommended attention be directed to claimant's lumbar spine. The doctor recommended physical therapy and to complete a series of epidural injections. If the pain did not improve, claimant should undergo a lumbar myelogram followed by a CAT scan and possible left L5-S1 foraminotomy and discectomy.

Dr. Edward J. Prostic evaluated claimant on January 20, 2015, for his 2014 work accident. He thought claimant may have a fracture of his sacrum or pelvis or left hip injury. Dr. Prostic suggested a bone scan to look for abnormal activity away from the low back, or in the alternative, an MRI. The doctor noted a 2010 MRI revealed claimant had multilevel degenerative disc disease, left paracentral disc protrusion at L5-S1, mild spinal canal stenosis at L3-4 and a right paraspinal mass. The doctor opined claimant's May 7, 2014, accident was the prevailing factor causing his current medical condition and need for treatment.

On April 29, 2015, Dr. Prostic evaluated claimant for his February 25, 2015, accident. The doctor indicated as a result of that accident, claimant had a cervical sprain and strain and probable rotator cuff sprain. Dr. Prostic opined claimant's February 25, 2015, accident was the prevailing factor for his cervical spine and left shoulder injuries.

Claimant testified he weighs 450 pounds and indicated he has always been heavyset, but has gotten heavier in the past couple of years. He acknowledged that since 2001, medical providers recommended he have gastric bypass bariatric surgery. He admitted having diabetes, hypersomnia, arthritic problems, lower extremity problems including numbness, elevated blood pressure, obstructive sleep apnea and chronic back pain prior to his work accidents. He testified he always had back pain before the May 7, 2014, accident, but he "wasn't in a lot of pain like I am now."⁴

Claimant indicated his health insurance will not pay for bariatric surgery. He wants to undergo bariatric surgery. According to claimant, Drs. Giroux, Danny M. Gurba, Thomas J. Doyle and another doctor, whose name he did not recall, recommended bariatric surgery for his low back and other health issues.

On May 18, 2015, Dr. Gurba saw claimant for his May 7, 2014, left hip injury. The doctor recommended an exercise program and diet counseling. Dr. Gurba recommended a left hip intra-articular injection, which claimant received. Claimant returned to Dr. Gurba on July 2, 2015. Claimant reported having pain relief until that week. Dr. Gurba indicated claimant had preexisting left hip osteoarthritis. The doctor recommended claimant undergo a left hip replacement, but because of his size, he was not a candidate. Dr. Gurba could not offer claimant treatment unless he underwent dramatic weight loss. The doctor

⁴ *Id.* at 16.

indicated claimant's health insurance would not pay for bariatric surgery. Dr. Gurba opined the primary prevailing factor for claimant's need for a left hip replacement is underlying and preexisting osteoarthritis. The doctor was certain claimant's work accident aggravated his left hip pain.

Prior to his work accidents, claimant received medical treatment for coronary artery disease. On March 27, 2014, Dr. Mark A. Thomas indicated claimant was considering bariatric surgery and that he had multiple complications related to his obesity including chronic back pain. In a letter dated November 3, 2015, Dr. Thomas J. Doyle stated he treated claimant for heart disease for a number of years and:

I have recommended that the patient consider undergoing bariatric surgery for weight loss. I believe that the weight loss procedure would help control the patient's underlying coronary disease, diabetes, his hypertension as well as his underlying pulmonary hypertension. In addition to helping the patient's cardiovascular health the weight loss will improve his chronic low back pain[.] . . . I have strongly recommended that he consider bariatric surgery. I believe that this is medically necessary.⁵

At the preliminary hearing, some of claimant's pre-accident medical records were placed into the record. Records from Dr. Thomas dated September 12, 2001, indicated claimant had uncontrolled diabetes mellitus Type II, diabetic nephropathy, asthma and was morbidly obese. Dr. Thomas discussed with claimant the fact that his morbid obesity was a major contributing factor to his overall medical issues.

Dr. Thomas saw claimant several more times, including January 3, 2003, when he assessed claimant with lumbar degenerative disease with chronic pain, morbid obesity, diabetes, asthma and lower extremity edema. On February 10, 2003, Dr. Thomas noted claimant had chronic back pain due to lumbar degenerative disease and treatment was difficult due to his morbid obesity. The doctor's April 29, 2003, notes indicated claimant's insurance would not cover inpatient weight management and claimant would consider bariatric surgery. Claimant saw Dr. Thomas again on June 17, 2003 and complained of back pain intermittently with radiation into the legs and noted claimant had been hospitalized in the past year.

On December 18, 2002, claimant was seen by Dr. William S. Rosenberg, a neurosurgeon. Claimant reported having low back pain radiating into his left leg, back of the thigh to the calf and foot, which felt asleep. Claimant reported he had the condition since the mid-1990s and received an epidural steroid injection on approximately an annual basis. The doctor indicated claimant was morbidly obese, weighing 460 pounds, and was not a candidate for surgery. Dr. Rosenberg indicated he had a 30-minute discussion with claimant that weight loss was the best alternative for the treatment of his spinal disease.

⁵ *Id.*, Cl. Ex. 1.

Claimant, on March 30, 2007, saw Dr. Kahdi Udobi, at the University of Kansas Medical Center. The doctor indicated claimant had a history of diabetes, hyperlipidemia, hypertension, coronary artery disease, sleep apnea and was morbidly obese. At the time, claimant was taking eight medications. Dr. Udobi recommended claimant undergo gastric bypass surgery for his morbid obesity.

On May 31, 2007, claimant again saw Dr. Thomas, who indicated a report from claimant's cardiologist suggested claimant consider bariatric surgery. Claimant reported his pulmonologist mentioned that recommendation also. Dr. Thomas noted, among other medical conditions, claimant was having occasional discomfort radiating into the right lower extremity. In notes from an August 30, 2010, appointment, Dr. Thomas indicated claimant was having back pain and seeing Dr. Nicolae, who referred claimant to a neurosurgeon. Dr. Thomas indicated claimant had multiple co-morbid conditions and his morbid obesity was a major contributing factor.

Claimant was evaluated by Dr. Osman Malik with the Stormont-Vail Sleep Center on April 28, 2010, for sleep apnea. The doctor indicated weight loss was essential to improving claimant's sleep disorder.

PRINCIPLES OF LAW AND ANALYSIS

The Workers Compensation Act places the burden of proof upon the claimant to establish the right to an award of compensation and to prove the conditions on which that right depends.⁶ "Burden of proof" means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record unless a higher burden of proof is specifically required by this act."⁷

K.S.A. 2013 Supp. 44-508(f)(2)(B) provides an injury by accident shall only be deemed to arise out of employment if the accident is the prevailing factor causing the injury, medical condition and resulting disability or impairment.

The ALJ, in granting claimant's request for bariatric surgery, focused on whether said surgery was medically necessary to aid in the treatment or cure of his work-related injuries. The ALJ's conclusion assumes claimant's low back and left hip injuries arose out of and in the course of his employment and, more specifically, that claimant's work accidents were the prevailing factor causing his morbid obesity, low back and left hip injuries and need for medical treatment.

⁶ K.S.A. 2013 Supp. 44-501b(c).

⁷ K.S.A. 2013 Supp. 44-508(h).

This Board Member finds claimant's work accidents were not the prevailing factor causing claimant's low back injury or medical condition for the following reasons:

- Claimant has a medical history of chronic low back pain radiating into one or both legs since at least 2002.
- Claimant reported undergoing yearly epidural steroid injections for his low back pain since the 1990s.
- In 2003, Dr. Thomas noted claimant had chronic back pain due to lumbar degenerative disease, recommended weight loss and indicated claimant desired bariatric surgery. As recently as 2010, Dr. Thomas indicated claimant was having back pain and was morbidly obese.
- Claimant saw Dr. Rosenberg in 2002 for low back complaints.
- Dr. Prostin's prevailing factor opinion is not credible. He reviewed claimant's 2010 MRI that showed multiple low back medical issues. He provided little, if any, explanation as to why claimant's work accident, not his preexisting back condition, was the prevailing factor causing his back injury and need for medical treatment.
- Dr. Hess' prevailing factor opinion is also discounted. He noted claimant had a prior history of back complaints dating back to 1997 and numerous diagnostic tests prior to claimant's May 2014 accident showed claimant had multilevel lumbar disc disease.
- Claimant presented insufficient evidence that his work accidents caused a new injury or physical change in the structure of his body.
- Claimant continues working for respondent performing his regular work duties.

Claimant's work accidents were not the prevailing factor causing his left hip injury or medical condition. This Board Member finds Dr. Gurba's opinion most credible. He indicated claimant had preexisting left hip osteoarthritis and needed a hip replacement, but the hip replacement could not be performed until claimant underwent dramatic weight loss. Dr. Gurba opined claimant's primary prevailing factor for his left hip replacement is underlying and preexisting osteoarthritis.

This Board Member finds claimant's work accidents were not the prevailing factor causing his morbid obesity. Morbid obesity is a medical condition. As noted above, several physicians diagnosed claimant with lumbar degenerative disc disease, morbid obesity and other medical conditions well before his work accidents.

Claimant's work accidents were not the prevailing factor causing his need for the medical treatment he requested, bariatric surgery. Claimant's pre-accident medical records are replete with notations recommending bariatric surgery or weight loss to treat claimant's preexisting medical conditions, including morbid obesity, chronic low back pain and sleep apnea.

The only physicians to discuss or recommend bariatric surgery after claimant's work accidents were Drs. Gurba and Doyle. Neither Dr. Gurba nor Dr. Doyle indicated

claimant's work accidents were the prevailing factor causing his need for bariatric surgery. As noted above, Dr. Gurba indicated claimant needed to lose weight in order to undergo a left hip replacement caused by preexisting osteoarthritis. The doctor noted claimant's insurance would not cover bariatric surgery. Dr. Doyle opined bariatric surgery would help with several of claimant's medical conditions, including chronic low back pain. However, his medical records and the letter he wrote do not indicate he was aware of claimant's work accidents.

In conclusion, the version of K.S.A. 44-508(f)(2)(B) enacted at the time of claimant's accidents provides that an injury by accident is deemed to arise out of employment only if the accident is the prevailing factor causing the injury, medical condition and resulting disability or impairment. Claimant failed to prove his accidents were the prevailing factor causing his low back and left hip injuries and medical conditions, including morbid obesity.

By statute the above preliminary hearing findings are neither final nor binding as they may be modified upon a full hearing of the claim.⁸ Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2014 Supp. 44-551(l)(2)(A), as opposed to being determined by the entire Board when the appeal is from a final order.⁹

WHEREFORE, the undersigned Board Member reverses the November 6, 2015, Preliminary Hearing Order entered by ALJ Roth.

IT IS SO ORDERED.

Dated this ____ day of December, 2015.

HONORABLE THOMAS D. ARNHOLD
BOARD MEMBER

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Steven M. Roth, Administrative Law Judge

⁸ K.S.A. 2014 Supp. 44-534a.

⁹ K.S.A. 2014 Supp. 44-555c(j).